(13)

Supreme Court, U.S.
FILED
NOV 27 1996
CLERK

No. 95-2074

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

CITY OF BOERNE, TEXAS,

Petitioner,

v.

P.F. FLORES, ARCHBISHOP OF SAN ANTONIO,
Respondent,

and

UNITED STATES OF AMERICA,
Intervenor-Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF OF AMICUS CURIAE CENTER FOR THE COMMUNITY INTEREST (IN SUPPORT OF PETITIONER CITY OF BOERNE, TEXAS)

H. JOSEPH ESCHER III
GILBERT R. SEROTA*
MIRANDA MCGOWAN
HOWARD, RICE, NEMEROVSKI, CANADY
FALK & RABKIN
A Professional Corporation
Three Embarcadero Center, 7th Floor
San Francisco, California 94111
Telephone: 415/434-1600

*Counsel of Record

Attorneys for Amicus Curiae
Center for the Community Interest

17 pp

TABLE OF CONTENTS

	Page
STATEMENT OF INTEREST OF AMICUS CURIAE	1
STATEMENT OF ISSUE	1
STATEMENT OF THE CASE	2
SUMMARY OF ARGUMENT	4
ARGUMENT	5
I. RFRA VIOLATES THE ESTABLISHMENT CLAUSE OF THE FIRST AMENDMENT.	5
A. RFRA Violates The Establishment Clause Because It Has No Secular Purpose.	6
B. RFRA Violates The Establishment Clause Because Its Primary Effect Is To Advance Religion.	8
II. RFRA IS UNCONSTITUTIONAL BECAUSE CONGRESS HAD NO POWER TO PASS IT UNDER ITS POWER TO ENFORCE THE FOURTEENTH AMENDMENT.	9
CONCLUSION	12

TABLE OF AUTHORITIES

	Page
Cases	
Board of Education v. Grumet, 512 U.S. 687, 129 L. Ed. 2d 546 (1994)	5
Bolling v. Sharpe, 347 U.S. 497 (1954)	10
Corporation of the Presiding Bishop v. Amos, 483 U.S. 327 (1987)	6
Employment Division v. Smith, 494 U.S. 872 (1990)	*passim*
Estate of Thornton v. Caldor, Inc., 472 U.S. 703 (1985)	5, 6, 8, 9
Fullilove v. Klutznick, 448 U.S. 448 (1980)	8
Hamilton v. Schriro, 74 F.3d 1545 (8th Cir.), *cert. denied*, 117 S. Ct. 193 (1996)	11
Katzenbach v. Morgan, 384 U.S. 641 (1966)	9-12
Lassiter v. Northampton County Board of Elections, 360 U.S. 45 (1959)	11
Lee v. Weisman, 505 U.S. 577 (1992)	7
Lemon v. Kurtzman, 403 U.S. 602 (1971)	6
Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988)	4
Oregon v. Mitchell, 400 U.S. 112 (1970)	9
Otten v. Baltimore & O. R. Co., 205 F.2d 58 (2d Cir. 1953)	8
Plaut v. Spendthrift Farm, Inc., 514 U.S.--, 131 L. Ed. 2d 328 (1995)	11, 12
Sherbert v. Verner, 374 U.S. 398 (1963)	10

Page

United States v. Lee, 455 U.S. 252 (1982) 4

United States v. Lopez, 511 U.S.--, 131 L. Ed. 2d 626 (1995) 9

Western Presbyterian Church v. Board of Zoning Adjustment, 862 F. Supp. 538 (D.D.C. 1994) 3

Wisconsin v. Yoder, 406 U.S. 205 (1972) 10

Statutes and Regulations

42 U.S.C.
§§2000bb to 2000bb-4 1
§2000bb 1, 10
§2000bb-1 1, 10
§2000bb(b)(1) 10

Legislative Materials

S. REP. NO. 103-111 (1993), *reprinted in* 1993 U.S.C.C.A.N. 1892, 1903 9

Other Authorities

Christopher L. Eisgruber & Lawrence G. Sager, *Why the Religious Freedom Restoration Act Is Unconstitutional*, 69 N.Y.U. L. Rev. 437 (1995) 7

Scott C. Idleman, *The Religious Freedom Restoration Act: Pushing the Limits of Legislative Power*, 73 TEX. L. REV. 247 (1994) 7

STATEMENT OF INTEREST OF AMICUS CURIAE

Amicus Curiae Center for the Community Interest ("CCI") is a national, not-for-profit organization that drafts, promotes and defends measures that enhance the safety and attractiveness of urban public spaces. CCI works with local officials and communities throughout the country to defend the rights of citizens to protect the quality of life in their cities and to enjoy vibrant, safe and welcoming urban centers. CCI has the consent of all parties to this case to file this amicus brief in support of Petitioner, City of Boerne, Texas.

CCI's efforts to help cities create and protect attractive neighborhoods and public spaces will be greatly affected by the Supreme Court's decision in this case. CCI has substantial experience with municipal regulations designed to promote urban centers, such as zoning regulations and regulations governing the use of public spaces. That experience includes helping reconcile disputes between groups that help the homeless and their host communities, drafting legislation, and consulting with civic and community leaders on urban quality of life issues. CCI believes its experience and perspective can aid the Court in deciding this case.

STATEMENT OF ISSUE

This amicus brief discusses the constitutionality of the Religious Freedom Restoration Act, 42 U.S.C. §§2000bb to 2000bb-4 ("RFRA"). RFRA was enacted in response to this Court's decision in *Employment Division v. Smith*, 494 U.S. 872 (1990), which held that facially neutral laws of general applicability that burdened the free exercise of religion did not abridge the free exercise of religion if the laws were rationally related to a permissible government interest. RFRA purports to overrule *Smith* and to require courts to strike down facially neutral laws of general applicability that substantially burden the free exercise of religion unless the law is the least restrictive means of achieving a compelling state interest. 42 U.S.C. §§2000bb, 2000bb-1.

This amicus brief addresses whether RFRA violates the Establishment Clause of the First Amendment and whether RFRA is a valid exercise of Congress's power to enforce the Fourteenth Amendment.

STATEMENT OF THE CASE

Over the last several decades, the major urban centers of the United States have been slowly abandoned in favor of suburbs. This migration has been driven in large part by the declining quality of city life and the increasing disorder that characterizes city neighborhoods, downtown centers, streets and parks. People seek places of relative calm and civility when making a home. If they cannot find these things in cities, those who can leave.

RFRA seriously compromises a city's ability to enforce zoning codes and regulations governing the use of public spaces to ensure that residential areas remain places where people want to live, and to regulate the use of parks so that people can gather and play together. Many religious organizations and churches believe that their spiritual mission is to minister to the poor. To carry out this mission, some churches have established centers to feed and shelter the homeless and the hungry—sometimes hundreds of people at a time—on church property. Very often churches, and their shelters and soup kitchens, are located in a city's residential neighborhoods. Other churches have set up mobile centers to feed the poor in city parks.

While the efforts of churches and religious organizations to feed and shelter the poor are certainly well-intentioned, they bring a host of problems into the residential neighborhoods and parks in which they operate. Centers to provide services to the poor and hungry can attract large numbers of needy individuals, greatly increasing the number of people coming into residential neighborhoods. Often that increased flow of traffic means an increase in littering, noise, unruliness, and sometimes harassment of neighborhood residents by the patrons of these centers.

Religiously motivated efforts to feed the hungry differ little from the efforts of many secular organizations that feed and shelter the poor. Indeed, RFRA has created the main difference between the two: communities cannot equally regulate centers to feed and shelter the poor that are run by religious groups. *See, e.g., Western Presbyterian Church v. Board of Zoning Adjustment*, 862 F. Supp. 538, 545-46 (D.D.C. 1994) (granting permanent injunction on church's motion for summary judgment against zoning board's decision that church's center to feed the poor could not operate in residential neighborhood).

Communities that seek to address these problems of public order and maintenance of community values are neither anti-religious nor anti-poor. Rather, they are legitimately concerned about the problems that these facilities sometimes produce. They want help given to those who need it, *and* they want safe and pleasant neighborhoods. It is possible for churches and religious groups to provide for those in need in a safe and community-friendly way, so long as cities have tools at their disposal to enable them to regulate those centers effectively. Indeed, countless centers to provide services to the homeless operate successfully under local regulation and have done so for many years.

RFRA, however, has vastly complicated city regulation of church-run centers. The principal tools available to cities and communities that seek to reduce the problems caused by centers to feed and shelter the poor are zoning and health and safety codes. But under RFRA, a church may legitimately claim protection to set up a soup kitchen to feed over a hundred people a day on its premises even though zoning codes would prohibit a restaurant from operating in that same residential neighborhood.

Such a sweeping exemption from facially neutral laws of general applicability is unprecedented and wrong. RFRA does not merely restore the law of free exercise to its pre-*Smith* status. Prior to *Smith*, a heightened level of protection for activities of religious groups was only used to

invalidate state unemployment compensation programs that conditioned eligibility on an applicant's willingness to work under conditions prohibited by his religion. *See Smith*, 494 U.S. at 883. For other types of cases, this Court "sometimes purported to apply" the compelling state interest test but "always found that test was satisfied" when applied to state laws of general applicability that burdened an individual's free exercise of religion (*Smith*, 494 U.S. at 883 (citing as an example *United States v. Lee*, 455 U.S. 252, 259-61 (1982), which upheld Social Security tax against free exercise claim of Amish)), and then this Court ultimately dropped the compelling state interest test altogether for free exercise claims. *See, e.g., Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 451-52 (1988) (declining to apply compelling state interest test to claim that construction of United States Forest Service road through area sacred to American Indian tribe violated tribe's free exercise of religion).

RFRA greatly expands the application of strict scrutiny to *all* cases where a religious organization claims that a law of general applicability substantially burdens its free exercise of religion. Particularly with respect to laws such as zoning laws and park regulations, RFRA's broad exemption for anyone claiming that a law substantially burdens the free exercise of religion seriously hampers cities' legitimate efforts to preserve the safety and character of residential neighborhoods and parks and to regulate land uses in appropriate ways.

SUMMARY OF ARGUMENT

This Court should find RFRA unconstitutional for two reasons: (1) it is an establishment of religion; and (2) Congress acted outside of its power to enforce the Fourteenth Amendment when it passed RFRA.

Laws that have no secular purpose and that have as their primary effect the advancement of religion amount to an unconstitutional establishment of religion under the First Amendment. RFRA is such a law. Its purpose and its

primary effect are the advancement of religion by exempting religiously motivated actors from laws of general applicability whenever such laws interfere with the exercise of religion.

Congress had no constitutional authority to pass RFRA. Congress may only act if the Constitution has given it the power to do so. Congress's articulated view that it was passing RFRA under its authority to enforce the Fourteenth Amendment was incorrect: the Fourteenth Amendment only empowers Congress to enact legislation to protect individuals from incursions by the states against their rights guaranteed by the Fourteenth Amendment; it does not empower Congress to reverse Supreme Court decisions interpreting the scope of those rights.

ARGUMENT

I.

RFRA VIOLATES THE ESTABLISHMENT CLAUSE OF THE FIRST AMENDMENT.

"A proper respect for both the Free Exercise and the Establishment Clause compels the State to pursue a course of 'neutrality' toward religion, favoring neither one religion over others nor *religious adherents collectively over nonadherents.*" *Board of Education v. Grumet*, 512 U.S. 687, 129 L. Ed. 2d 546, 556 (1994) (internal quotations omitted) (citations omitted) (emphasis added). By imposing strict scrutiny review on *all* facially neutral laws of general applicability that substantially burden the exercise of religion, RFRA violates the Establishment Clause: Congress cannot place the *religious* claims of some over the secular policy judgments of others. *See Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 709 (1985) (finding law giving employees right to take off Sabbath unconstitutional on grounds that religious concerns "automatically control" secular concerns of workplace). Congress also may not place claims to act for religious reasons above similar claims to act for secular reasons of moral conscience. RFRA does both and is unconstitutional.

This Court has adopted a three-part test first enunciated in *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971), to determine if a law is an unconstitutional establishment of religion. To be constitutional, the law at issue must (1) serve a secular legislative purpose; (2) have as its primary effect neither the advancement nor inhibition of religion; and (3) not foster an excessive governmental entanglement with religion. *See Thornton*, 472 U.S. at 708. A law is unconstitutional if it fails to satisfy any one of these three criteria. *See, e.g., id.* at 709-10 (finding law unconstitutional because its primary effect was advancement of religion). RFRA should be found unconstitutional because it fails to meet two of these factors: it has no secular purpose, and its primary effect is the advancement of religion.

A. RFRA Violates The Establishment Clause Because It Has No Secular Purpose.

RFRA has no secular purpose. RFRA protects only persons who assert religious beliefs or practices—not moral convictions in general—from the burden of laws of general application. Although "government may (and sometimes must) accommodate religious practices" without violating the Establishment Clause, at some point "benevolent neutrality which will permit religious exercise to exist . . . without interference" will "devolve into 'an unlawful fostering of religion.'" *Corporation of the Presiding Bishop v. Amos*, 483 U.S. 327, 334-35 (1987). In *Corporation of the Presiding Bishop*, this Court upheld the exemption for the secular nonprofit activities of religious organizations from Title VII's ban on discrimination on the basis of religion. In that case, this Court found that Title VII's exemption to religious organizations had a secular purpose because Congress did not abandon neutrality with respect to religion "with the intent of promoting a particular point of view in religious matters." *Id.* at 335.

RFRA is unlike Title VII's exemption for religious organizations and is not merely a benign accommodation of

religion. By exempting religiously motivated persons from laws of general applicability that substantially burden their ability to act in accordance with their religion, Congress gives such persons the privilege to act in accordance with their religious views in contravention of state and local laws that still apply to everyone else. It does not, however, give a similar exemption to those who act according to the dictates of secular moral conscience. RFRA effectively elevates the commands of religion above those of secular moral conscience. *See* Scott C. Idleman, *The Religious Freedom Restoration Act: Pushing the Limits of Legislative Power*, 73 TEX. L. REV. 247, 285 (1994) (arguing that "Congress would be hard-pressed to offer a rationale for RFRA's singular protection of religious liberty that is not in some way religious or that does not in some way establish religion as a governmentally preferred activity"). Congress is forbidden from expressing a preference for all religions generally over irreligion. *See Lee v. Weisman*, 505 U.S. 577, 610-11 (1992) (Souter, J., concurring); *see also* Christopher L. Eisgruber & Lawrence G. Sager, *Why the Religious Freedom Restoration Act Is Unconstitutional*, 69 N.Y.U. L. REV. 437, 448 (1994) (arguing that "the idea of a broad privilege for religiously motivated conduct baldly contradicts the best understanding of the foundations of religious freedom").

RFRA does not merely advance the secular interest of enforcing constitutional rights. In *Smith*, the Court interpreted the Free Exercise Clause to mean that facially neutral laws that burden the free exercise of religion are not unconstitutional if they are rationally related to a legitimate state interest. *Smith*, 494 U.S. at 890. RFRA purports to create new statutory rights to prohibit states and cities from enforcing laws that would be upheld as constitutional if interpreted under *Smith*. Because RFRA purports to create a new set of statutory rights only for the religiously motivated, RFRA has no secular purpose and is unconstitutional.

B. RFRA Violates The Establishment Clause Because Its Primary Effect Is To Advance Religion.

RFRA also violates the Establishment Clause because its primary effect is to advance religion. In *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703 (1985), this Court found unconstitutional a Connecticut statute that gave sabbath observers the absolute right to take their sabbath day off from work without suffering any penalty from their employers. The Court held that the law's primary effect was to advance religion and, accordingly, that it violated the Establishment Clause. By requiring employers to conform their business practices to the observance of sabbath days, the "State . . . commands that Sabbath religious concerns automatically control over all secular interests at the workplace." *Id.* at 709. No one has the right under the First Amendment to "insist that in pursuit of their own interests others must conform their conduct to his own religious necessities." *Id.* at 710 (quoting Judge Learned Hand in *Otten v. Baltimore & O. R. Co.*, 205 F.2d 58, 61 (2d Cir. 1953)). Congress, therefore, may not require that the religious necessities of some control the secular concerns of the community at large.

Like the law at issue in *Thornton*, RFRA requires that states and localities conform their land use ordinances, their zoning laws, their park use regulations, and indeed, *all* of their laws, to the tenets of the various religions practiced within their jurisdiction. It commands that laws promoting quality of life for all city residents give way to religiously motivated efforts to feed and shelter the poor unless the law in question is the least restrictive means of achieving a compelling state interest. In practice, RFRA's primary effect is to exempt religious activities from state and local laws.[1] RFRA violates the Establishment Clause because it com-

---

[1]Strict scrutiny is a nearly insurmountable hurdle. *Cf. Fullilove v. Klutznick*, 448 U.S. 448, 507 (1980) (Powell, J., concurring) (observing that strict scrutiny is virtually impossible to satisfy in the equal protection arena).

mands that religious concerns "automatically control over all secular" public policy interests. *Thornton*, 472 U.S. at 709.

II.
RFRA IS UNCONSTITUTIONAL BECAUSE CONGRESS HAD NO POWER TO PASS IT UNDER ITS POWER TO ENFORCE THE FOURTEENTH AMENDMENT.

Congress cannot pass legislation unless the Constitution specifically grants it power to do so. *United States v. Lopez*, 511 U.S.--, 131 L. Ed. 2d 626, 633-34 (1995). Congress passed RFRA purportedly under its power to enforce the Fourteenth Amendment through appropriate legislation. S. REP. NO. 103-111, at 14 (1993), *reprinted in* 1993 U.S.C.C.A.N. 1892, 1903. Section 5 of the Fourteenth Amendment permits Congress to enact legislation to enforce the guarantees of the Fourteenth Amendment (*Katzenbach v. Morgan*, 384 U.S. 641, 648 (1966)), including the Bill of Rights as incorporated by the Fourteenth Amendment's Due Process Clause. Congress has less power to enforce the Bill of Rights than it has to enforce the Civil War Amendments under its Fourteenth Amendment powers. *See Oregon v. Mitchell*, 400 U.S. 112, 129 (1970) (opinion by Black, J.) (stating that Congress operates at the height of its Section 5 powers when it acts to enforce the Civil War Amendments' ban on racial discrimination).

A law may be upheld as within Congress's power to enforce the Fourteenth Amendment if (1) it "may be regarded as an enactment to enforce the Equal Protection Clause"; (2) it is "plainly adapted toward that end"; and (3) it is not prohibited by and is consistent with "the letter and spirit of the constitution." *Morgan*, 384 U.S. at 651. RFRA exceeds Congress's power to enforce the Fourteenth Amendment because it fails all three prongs of the *Morgan* test.

First, RFRA exceeds Congress's power to legislate because it does not enforce the Free Exercise Clause against incursions by the *states*. Because the Fourteenth Amend-

ment only applies to the states (*see Bolling v. Sharpe*, 347 U.S. 497, 499 (1954) (holding that, as Fourteenth Amendment did not apply to congressional acts, prohibition against racial segregation by federal government must reside in Fifth Amendment Due Process Clause)), Congress's enforcement power only extends to efforts by the states to undermine rights guaranteed by the Fourteenth Amendment. RFRA was not passed to undo any specific or pattern of state laws that undermined the free exercise of religion. Rather, Congress passed RFRA to undo what it saw as too narrow a definition of the right to free exercise by this Court. 42 U.S.C. §2000bb. RFRA stands in direct contrast to the Voting Rights Act of 1965, upheld as constitutional by this Court, in which Congress prohibited New York's English literacy requirements to vote. *Morgan*, 384 U.S. at 654-56. There, the Supreme Court found that this act of Congress secured for the Puerto Rican community nondiscriminatory treatment by government. RFRA does not secure the right to free exercise of religion against specific state efforts to limit that right. Instead, RFRA defines the scope of free exercise rights in an attempt to undo a Supreme Court decision it thought too narrowly circumscribed those rights.

Second, RFRA exceeds Congress's power to enforce the Fourteenth Amendment because it is not plainly adapted toward the end of enforcing the Free Exercise Clause. RFRA does not even attempt to *enforce* the Free Exercise Clause. Rather, it quite baldly purports to *define* the scope of free exercise protection and attempts to reverse this Court's construction of the Free Exercise Clause in *Smith*: Congress states that the purpose of RFRA is to "restore the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972) and to guarantee its application in all cases." 42 U.S.C. §2000bb(b)(1). Congress even goes so far as to set out the standard for courts to follow in adjudicating free exercise claims. 42 U.S.C. §2000bb-1. Rather than enforcing the Free Exercise Clause against incursions by the states, RFRA purports to redefine the scope of the Constitution itself as

interpreted by this Court in *Smith*. As such, RFRA is not plainly adapted toward the end of enforcing the Free Exercise Clause.

Respondents may argue that *Morgan* supports Congress's power to enact RFRA and overrule *Smith*. Prior to Congress's act banning New York's English literacy requirement at issue in *Morgan*, the Supreme Court in *Lassiter v. Northampton County Board of Elections*, 360 U.S. 45, 52-53 (1959), held that North Carolina's English literacy requirement was facially constitutional. Respondents may argue, like RFRA's reversal of *Smith*, the Voting Rights Act of 1965 reversed the Supreme Court's decision in *Lassiter* by banning literacy requirements.

Such an argument misinterprets this Court's decisions in *Lassiter* and *Morgan*. Because *Lassiter* was only a facial challenge to North Carolina's literacy requirement and Congress in enacting the Voting Rights Act made findings as to the actual discriminatory effect of New York's literacy requirement, Congress did not "reverse" the Court's decision in *Lassiter*. *See Morgan*, 384 U.S. at 654 ("Congress might well have questioned . . . , and some evidence suggest[ed] that prejudice played a prominent role in the enactment of [New York's] requirement"); *see also Hamilton v. Schriro*, 74 F.3d 1545, 1568 (8th Cir.), *cert. denied*, 117 S. Ct. 193 (1996) (McMillian, J. dissenting) (explaining in this respect the difference between Voting Rights Act and RFRA).

RFRA is unquestionably an attempt by Congress to reverse *Smith* and to usurp the quintessential judicial power to determine the meaning of the Constitution in particular cases by requiring the courts to return to a standard of review this Court found unworkable and abandoned in *Smith*. As such, RFRA is akin to the federal law this Court held unconstitutional in *Plaut v. Spendthrift Farm, Inc.*, 514 U.S.--, 131 L. Ed. 2d 328 (1995). That law directed the courts to apply a particular limitations period to private lawsuits for securities law violations after this Court had determined that a different limitations period applied. *Id.*

at 339-40. *Plaut* reaffirmed the principle first enunciated in *Marbury v. Madison*—that it is unequivocally the province of the courts to say what the scope of a law is. *Id.* at 342, 345. It is the province of the courts, not Congress, to interpret the scope of constitutional rights and to devise standards of review for determining when violations of those rights have occurred. Section 5 of the Fourteenth Amendment does not alter that balance of powers.

Lastly, RFRA fails the third prong of the test set out in *Morgan* because it is not "consistent with the letter and spirit of the constitution." In other words, Congress may not violate any other provision of the Constitution when exercising its power to enforce the Fourteenth Amendment. Congress violated the Establishment Clause when it enacted RFRA because RFRA has no secular purpose and its primary effect is to advance religion.

CONCLUSION

RFRA grants a sweeping exemption from local and state laws to persons claiming a religious motivation to violate those laws, such as churches and religious organizations that ignore zoning ordinances and operate centers to feed and shelter the poor in residential areas and parks. In so doing, RFRA hamstrings cities' and states' efforts to protect

and enhance the quality of life for all who live in urban areas. CCI respectfully requests that this Court hold RFRA unconstitutional.

DATED: November 27, 1996.

Respectfully,

H. JOSEPH ESCHER III
GILBERT R. SEROTA*
MIRANDA MCGOWAN
HOWARD, RICE, NEMEROVSKI, CANADY
FALK & RABKIN
A Professional Corporation

*Counsel of Record

Attorneys for Amicus Curiae
Center for the Community Interest